Supreme Court, U.S.
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No. 84-1257 (2)

In the Supreme Court of the United States

OCTOBER TERM 1984

RICHARD L. GLOVER, on behalf of himself and all others similarly situated,

Petitioner,

v.

UNITED GROCERS, INC., an Oregon Corporation, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT UNITED GROCERS, INC. OPPOSING THE PETITION

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QUESTION PRESENTED

Does the six months limitation period adopted in *DelCostello* v. *Teamsters*, 462 U.S. 151 (1983), apply to a hybrid case for alleged breach of contract and breach of the duty of fair representation in which plaintiff seeks to vacate a decision of a contractually-created Joint Conference Board?

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STATEMENT OF THE CASE

Petitioner's claims, as discussed in the Petition, are irrelevant to the actual question presented by this case.

The following are the relevant facts.

1. The Joint Conference Board decision which Petitioner seeks to vacate was issued August 9, 1982 and became effective August 22, 1982 (see Pet. App. 23-24).

2. Following that decision, Petitioner pursued arbitration of his grievance. However, under the collective bargaining agreement, Petitioner was not entitled to arbitration unless the Joint Conference Board deadlocked, and it had not done so. Consequently, on September 28, 1982, the Federal Mediation and Conciliation Service declined to institute arbitration. [1] Petitioner's administrative remedies under the contract were exhausted on August 9, 1982 (*see* District Court Opinion, Pet. App. 3-4).

3. Following the Joint Conference Board decision, Petitioner filed an unfair labor practice charge with the National Labor Relations Board (NLRB) seeking relief from that decision. This charge was pending from November 12, 1982 to December 23, 1982. The pendency of this unfair labor practice charge did not

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[1] On December 20, 1982, the union advised Petitioner that it would not participate in any arbitration.

preclude maintenance of an action in federal court. (*see* District Court Opinion Pet. App. 4-5).

4. Petitioner filed this action in federal district court on March 21, 1983, which was seven months and twelve days after the Joint Conference Board decision (Pet. App. 4).

REASONS FOR DENYING THE PETITION

Petitioner brought his original claim for alleged breach of his contract seniority rights. His claim was heard by the Joint Conference Board which was part of the grievance and arbitration procedure provided in the collective bargaining agreement negotiated by Petitioner's union representative. The Joint Conference Board did not give him the relief he sought. The Joint Board upheld the employer's action and directed the seniority lists to be dovetailed to avoid future disputes (Pet. App. G).

1. Because this action was filed more than six months after the effective date of the Joint Conference Board decision, it was dismissed as time-barred based on the statutory six months limitation period applied by this Court in *DelCostello* v. *Teamsters*, 462 U.S. 151 (1983), to actions which effectively vacate arbitration awards. Petitioner claims that his case should be heard because the Court has never decided whether or not such a Joint Board decision should be treated as an arbitration award. Petitioner's contention is erroneous.

In both *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981) and *DelCostello* v. *Teamsters*, *supra*, plaintiffs brought their actions following dissatisfaction with the results of Joint Board hearings, which under the respective collective bargaining agreements were final and binding. In both cases plaintiffs sought to vacate the awards of joint panels which had upheld their discharges. Although the Court in *DelCostello* mooted *U.P.S.* v. *Mitchell* and applied the six month statute of limitations in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) to hybrid actions for breach of contract and breach of the duty of fair representation, it did not criticize the characterization of a Joint Board decision as the equivalent of an arbitration award. The Court then remanded *DelCostello* for further proceedings, consistent with the application of the six month statute of limitations.

2. Petitioner also claims that policy reasons make the six months limitation period inapplicable to non-arbitrated Joint Board decisions. Petitioner's policy arguments are insubstantial. Petitioner theorizes that such a "short" limitation period would allow union and management representatives to make changes in collective bargaining agreements which affect employees not involved in the grievance. However, most, if not all, grievance resolutions affect employees not involved in the particular grievance. Grievances and awards over contract interpretations invariably dictate how the terms of the contract will be applied to other employees.

A discharge grievance which results in reinstatement leads to the layoff or termination of a replacement. If Petitioner's argument were accepted, grounds would exist to undercut the *DelCostello* rule in every case.

Petitioner also speculates that contract modifications resulting from Joint Board action can be implemented without notice to affected employees, and the "short" six months limitation period might expire before the employees can take action. Such a situation did not, however, exist in this case. Petitioner had notice of the Joint Board action and sought relief through contract procedures and from the NLRB. Although these actions did not have the result which Petitioner desired, Petitioner did not immediately bring this action. That delay does not call into question the decision of the district and circuit courts applying the six months limitation period.

CONCLUSION

The action of the lower courts in characterizing this suit as the kind of hybrid claim to which *DelCostello* applies a uniform six months limitation period was correct. The petition presents nothing for review and should be denied.

Respectfully submitted,

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